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No. 96-741

# In the Supreme Court of the United States

OCTOBER TERM, 1996

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, PETITIONER

*v.*

UNITED STATES DEPARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals properly affirmed, as supported by substantial evidence, the Secretary's order disallowing $961,003 of net profits that petitioner, the Florida Department of Labor and Employment Security, accumulated through its administration of job training and placement programs funded by the Job Training Partnership Act (JTPA), 29 U.S.C. 1501 *et seq.*, and the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 3a-13a) is unreported. The final decision and order of the Secretary of Labor (App., *infra*, 1a-12a) the Secretary's order denying petitioner's request for reconsideration (App., *infra*, 13a-17a), and the decision and order of the ALJ (Pet. App. 14a-28a) also are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. A petition for rehearing was denied on July 1, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 30, 1996. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Job Training Partnership Act (JTPA), 29 U.S.C. 1501 *et seq.*, and the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*, provide federal grants to state and local governments to establish and maintain job training and placement programs. Pet. App. 4a. The Governor of Florida has assigned petitioner the responsibility for administering those federally-funded job programs; petitioner maintains a JTPA revenue account for the federal funds. As relevant here, petitioner contracted with one of its subagencies, the Florida Employment Security Job Service, and with various Service Delivery Areas (SDAs) created by the Governor under 29 U.S.C. 1511, to provide the training and placement services. Pet. App. 4a-5a.; App., *infra*, 1a-3a.

This case arose out of an audit of petitioner's JTPA revenue account conducted by the Office of the Inspector General of the Department of Labor (DOL) pursuant to 29 U.S.C. 1575(b). Pet. App. 4a; App., *infra*, 1a. Following that audit, a DOL grant officer issued a Final Determination on March 13, 1993, concluding that for the years 1983 through 1989, the account made $961,003 in net profits from numerous contracts between petitioner and various offices of the Job Service agency and the SDAs. Pet. App. 4a. Because the contracts established, in advance, a set price for training and placement services, they were considered fixed unit contracts, as distinguished from contracts that reimburse contractors for actual costs incurred. *Id.* at 5a & n.4. The grant officer, however, found that the fixed unit method of contracting did not

meet the criteria in 20 C.F.R. 629.38(e)(2) (1984), the applicable regulation then in effect. Pet. App. 5a. Specifically, the grant officer found that contracting method unacceptable because the contracts were between petitioner and other state entities and thus were not negotiated at arms-length. *Ibid.* As a result, petitioner was able to make a profit on JTPA grant money by consistently setting a fixed price higher than its actual costs. *Ibid.* The grant officer concluded that the profits should be disallowed, since they were not properly considered training costs. *Id.* at 5a-6a.

2. Pursuant to petitioner's request, a hearing was held before an administrative law judge (ALJ). Pet. App. 19a. The ALJ concluded that the grant officer's determination should be reversed, reasoning that DOL failed to establish its prima facie case that petitioner had violated applicable regulations. *Id.* at 28a. The ALJ further concluded that the regulations did not require arms-length negotiation of JTPA contracts and did not prohibit petitioner's retention of accumulated profits. *Id.* at 21a-26a.

The Secretary of Labor reviewed the decision pursuant to 29 U.S.C. 1576(b). Contrary to the ALJ, the Secretary found that DOL had established its prima facie case through four contracts produced by petitioner that the ALJ had inexplicably overlooked but that petitioner's counsel had conceded were representative of the relevant contracts. App., *infra*, 4a-7a. Based on that concession, the Secretary examined the four record contracts and concluded that all of petitioner's contracts with other state entities contained terms that contravened 20 C.F.R. 629.38(e)(2) (1984), the DOL regulation governing fixed unit contracts. App., *infra*, 5a-6a. The Secretary also held that the

$961,003 in profits did not qualify as a cost "necessary and reasonable for the proper and efficient administration of the program" under 20 C.F.R. 629.37(a) (1984). App., *infra*, 7a-8a. The Secretary relied on the fact that written summaries for each program year revealed a consistent pattern of excess earnings of nearly one million dollars. *Ibid.* In light of that pattern, the Secretary found that petitioner's failure to adjust fixed unit prices was inconsistent with prudent management, especially in view of the fact that petitioner "was, for all practical purposes, on both sides of the contracting process given their monitoring responsibilities over the contracting entities." *Id.* at 8a. Furthermore, given that the intra-agency contracts were not conducted at arms-length, the Secretary concluded both that the excess earnings could not qualify as necessary and reasonable program costs, and that the fixed unit mode of contracting was not permissible. *Id.* at 9a-11a. Accordingly, the Secretary ordered petitioner to repay to the Department of Labor the excess earnings of $961,003.

3. Petitioner sought review in the United States Court of Appeals for the Eleventh Circuit, challenging the evidentiary support for the Secretary's determination. Petitioner urged that the one contract that DOL produced—referred to as the Manasota contract—was insufficient to meet the agency's burden of production and did not amount to substantial evidence in support of the decision. Pet. App. 11a. The court rejected that argument, finding it "foreclosed * * * by the fact that there were four other contracts in evidence, which the state agrees were representative of all of the contracts." *Ibid.* Based on that concession, the court concluded that "none of the

contracts qualified as fixed unit agreements written in accordance with § 629.38(e)(2)." *Ibid.* Because the court found that those four contracts amply supported the Secretary's decision in this regard, the court found it unnecessary to address petitioner's argument that an earlier settlement agreement barred the Department of Labor from relying on the Manasota contract. *Id.* at 11a n.15. The court also refused to consider petitioner's argument that profits stemming from the Manasota contract were erroneously disallowed, because petitioner had not developed that argument below. *Ibid.*

The court further held "that substantial evidence supports the Secretary's finding that the profits were not necessary and reasonable to the efficient administration of the JTPA [training] programs as required by § 629.37(a)." Pet. App. 12a. In light of evidence establishing that the contracts in question were between interrelated entities and had generated excess earnings for a number of years, the court affirmed the Secretary's determination that DOL had met its initial burden of showing that the profits were neither necessary nor reasonable, and that petitioner had failed to rebut that showing through persuasive evidence to the contrary. *Ibid.*

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. The court of appeals reasonably rejected petitioner's evidentiary challenges to the Secretary's determination that the contracts did not qualify as fixed unit contracts under 20 C.F.R. 629.38(e)(2)

(1984) and that the excess earnings did not qualify as necessary and reasonable program costs. Abandoning that substantial evidence attack, petitioner now raises a panoply of new arguments, which may not be raised for the first time before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see also 29 U.S.C. 1578(a)(3) ("No objection to the order of the Secretary shall be considered by the court unless the objection shall have been specifically and timely urged before the Secretary.").

In any event, petitioner's contentions are meritless. First, petitioner attempts to reframe the case by arguing that the Secretary's decision, as affirmed by the court of appeals, violates the underlying policies of the JTPA. Pet. 5-9. Although petitioner is correct (see Pet. 6, 7-8) that the Act envisions a significant supervisory role for the States, there is no merit to petitioner's suggestion (Pet. 7) that this case therefore implicates principles of federalism. In this regard, petitioner errs in relying (Pet. 7-9) on the regulatory requirement that the Secretary accept "guidelines, interpretations and definitions adopted by the Governor * * * to the extent that they are consistent with the Act and applicable rules and regulations." Pet. 7 (quoting 20 C.F.R. 627.1 (1992)). That regulatory provision, which requires acceptance of the State's guidelines only "to the extent * * * consistent" with federal law, refutes petitioner's contention (Pet. 8) that "the states did not accept JTPA funds [on the] condition * * * that expenditures must conform to the Secretary's interpretation of the Act and regulations." Moreover, although petitioner asserts that the State relied on the Secretary's promise to "accept Florida's defini-

tions and interpretations," *ibid.*, it points to no applicable state interpretations.

2. Petitioner also argues (Pet. 10) that the decision below conflicts with this Court's decision in *Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656 (1985). In fact, *Bennett* upheld, as clearly supported by the applicable regulations, the agency's disallowance of funds granted to a State under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, finding it unnecessary to determine the amount of deference to which the responsible federal agency was entitled. 470 U.S. at 670. Nothing in *Bennett* supports petitioner's contention that it is entitled to deference in its interpretation of the JTPA and applicable regulations.

Nor is there merit to petitioner's argument (Pet. 11) that the decision below conflicts with the principle expressed in *Chicano Education & Manpower Services* v. *Department of Labor*, 909 F.2d 1320, 1327 (9th Cir. 1990), that administrative agencies must follow their own regulations. That argument merely restates the proposition that the Secretary's decision in this case conflicts with 20 C.F.R. 627.1 (1992). The Department of Labor fully agrees that agencies are bound by their regulations, but that principle is of no avail to petitioner because the court of appeals correctly affirmed the Secretary's decision in this case as consistent with his regulations.*

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* Petitioner also asserts that the Secretary misapplied 20 C.F.R. 629.38(e)(2) (1984), which only applies to JTPA funds, to disallow net profits generated by contracts executed with Wagner-Peyser funds. Pet. 13. Not only did petitioner fail to raise that issue below, see 29 U.S.C. 1578(a)(3), but, as the court of appeals noted, Pet. App. 9a n.13, the agency did not apply that regulation in determining that the profits generated by

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997

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the Wagner-Peyser contracts were not necessary and reasonable, and that those contracts were not negotiated at arms-length.

**APPENDIX**

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR

WASHINGTON, D.C.

Date: December 5, 1994
Case No. 92-JTP-17

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IN THE MATTER OF

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, COMPLAINANT

*v.*

UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

BEFORE: THE SECRETARY OF LABOR

---

**FINAL DECISION AND ORDER**

This case arises under the Job training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988), and the regulations issued thereunder at 20 C.F.R. Parts 626-638 (1993).

**BACKGROUND**

The Grant Officer issued a Final Determination on March 13, 1993, disallowing $961,003, which the Florida Department of Labor and Employment Security (DLES) accumulated in excess revenues charged to its JTPA program during the Program Years (PY)

1984-1989. Respondent's Exhibit 1: Administrative File (A.F.) at 11-15. The Grant Officer's disallowance was based on an audit report by the U.S. Department of Labor's Office of the Inspector General (OIG), *Id.* at 46-96, which examined the revenue sources of the State's JTPA Revenue Account, G-3880 - Job Service Contract Profit/Loss.[1] The State used $800,000 of these funds to repay part of a $1.1 million debt resulting from unallowable Comprehensive Employment and Training Act (CETA) program costs previously disallowed by the Grant Officer. The primary objective of the OIG audit was to identify the sources of the contract revenues in the account, the use of the revenues and the State's compliance with cost principles and program regulations in the accumulation of these revenues. A.F. at 58. The auditors found that the use of the G-3880 Account funds violated the terms of the CETA settlement which required the State to repay the debt with non-Federal funds. *Id.* at 48. The State replenished the funds in the G-3880 Account. *Id.* at 54.

The OIG also found the accumulation of the funds in the G-3880 Account to be inappropriate and contrary to applicable Federal regulations and cost principles. *Id.* at 52-53. The account funds were the net accumulated profits realized by excess charges over actual costs by Florida Employment Service Job Service (ESJS) local offices to provide placement services for JTPA participants. The ESJS local offices entered into approximately 250 fixed unit price, performance-based (FUPPB) contracts with another Florida Department of Labor agency, the Division of Labor, Employment and Training (DLET) and various JTPA

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[1] Detail Summary, A.F. at 68-75.

Service Delivery Area (SDA) subgrantees which were monitored by DLET. DLET is the State Labor Department agency responsible for the administration of JTPA and the Wagner-Peyser Act acted and supervises the ESJP and the Bureau of Job Training. DLET also has oversight of the procurement activity of the SDA subgrantees and local ESJS offices. The OIG determined that the use of FUPPB contracts, as contrasted to cost reimbursement contracts, between units of the same State department was not acceptable, for such contracts could not be considered arm's length transactions. A.F. at 62.

The auditors further determined that the statutory three year time limit to expend program funds had elapsed and recommended that the funds in the G-3880 Account be returned to the U.S. Department of Labor since the funds could not be reprogrammed for JTPA activities. *Id.* at 63.

The Grant Officer's Initial Determination reflected the OIG's findings with regard to the inappropriateness of the contractual relationship between DLES and the ESJS. The Grant Officer also specifically stated that the State was aware that its use of fixed unit cost contracts containing terms which provided for payment for activities and costs other than the regulatory permissible payment for placement after training did not qualify for the single unit charging provisions of the JTPA regulations at 20 C.F.R. § 629.38(e)(2).[2] *Id.* at 20.

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[2] 20 C.F.R. § 629.38 entitled *[c]lassification of costs* provides in part:

(e) . . .

(2) Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost

The Grant Officer's Final Determination reiterated, with greater detail, that the fixed unit cost contracts entered into by DLET and the SDA's with the ESJA local offices failed to qualify pursuant to the regulations at 20 C.F.R. § 629.38(e)(2). *Id.* at 13.

The State timely appealed the Grant Officer's Final Determination and a hearing was held on July 19, 1993. The presiding Administrative Law Judge (ALJ) issued a Decision and Order (D. and O.) on May 2, 1994, reversing the Grant Officer's Final Determination. D. and O. at 10. The Grant Officer excepted to the ALJ's decision and the Secretary accepted the case for review on June 8, 1994.

**DISCUSSION**

The ALJ determined that the U.S. Department of Labor failed to meet its burden of production because it did not put forth enough evidence to establish a *prima facie* case to support allegations that FDLES violated JTPA regulations. *Id.* at 5-6. The substance of the ALJ's determination was that the U.S. Department of Labor put into evidence only one contract,

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categories but may be charged entirely to training or retraining services when the agreement:

(i) Is for training under title II or for retraining under title III, . . .

(ii) Is fixed unit price; and

(iii) (A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement; . . .

(1991)

This regulations does not appear in the current regulations.

that being between the Manasota Industry Council, Inc. (Manasota) and DLES, as representative of all 250 FUPPB contracts pertaining to the profits accrued in Account G-3880. The ALJ found that the Manasota contract was in fact violative of the pertinent regulation at 20 C.F.R. § 629.38(e)(2) since the contract contained both fixed unit cost characteristics and cost reimbursement characteristics. He determined, however, that "[w]ithout offering further evidence, USDOL cannot expect to overcome even the relatively weak burden of establishing a *prima facie* JTPA violation solely on the basis of the Manasota contract." *Id.* at 6.

The ALJ apparently did not consider the four contracts that FDLES introduced into evidence at the hearing [3] which he determined were satisfactory to decide the issues involved in the case. ALJ's Order Denying Motion to Admit, issued Nov. 22, 1993, slip op. at 2. FDLES counsel admitted at the hearing that the four contracts were essentially the same as the balance of the 250 contracts and representative of them.[4] When these contracts are examined, each

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[3] Admitted into evidence as Complainant's Exhibits (CX) 32, 33, 34 and 35.

[4] The colloquy between the ALJ and FDLES Counsel Cummings:

> Counsel: I have contracts for you for program years 1986, 1987, 1988, and 1989.
>
> ALJ: So that's five [sic] years?
>
> Counsel : Yes, sir.
>
> ALJ : Okay. How are those contracts different from the remaining contracts? . . .

contains characteristics of both fixed unit cost contracts and cost reimbursement contracts, and include a payment schedule for the placement of participants without training,[5] all of which is in contravention of specific regulatory requirements. *See* fn. 2 at 3.

Admittedly, a sample of four contracts, or five in the record if the Manasota contract is also considered, may not be statistically impressive, except for the fact that every contract in the sample fails to meet the regulatory requirements for a single unit charge agreement. This factor in combination with FDLES counsel's assurance regarding the representativeness of the contracts submitted into evidence, and the State's destruction of the pertinent contracts from PY 1983-1985,[6] persuades me to reverse the

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> Counsel : Essentially, Your Honor, I don't feel they're any different. They're all fixed unit price performance based contracts, they all set forth that full payment will be received once placement has been made in the . . . [sic].
>
> ALJ : So there's essentially no difference between any of them?
>
> Counsel : Basically, Your Honor, I don't think so. They were all written by various service delivery areas. We have 24 service delivery areas throughout the State of Florida, geographically located throughout the state. But those service delivery areas wrote the those contracts pursuant to policy instructions, so far as the specific elements of 629.38 (e)(2), those elements are within those contracts.

Transcript (Tr.) at 22-23.

[5] CX 32 at II, 1-3; CX 33 at 5; CX 34 at 6-9, 23; CX 35 at 6, 11.

[6] ALJ's Order Denying Motion to Admit at 2.

ALJ's holding that the Grant Officer failed to meet the burden of production.

Since I have determined that the Grant Officer has met the burden of production, the burden of persuasion devolved upon FDLES to show that the balance of the contracts entered into between DLET and the SDA subgrantees with the ESJS local offices met the regulatory requirements governing FUPPB contracts. This they did not do, although the subject contracts, at least for PY 1986-1989 were apparently retrievable by the State. Tr. at 21-22.

The ALJ next determined that the U.S. Department of Labor failed to meet its burden of production with regard to JTPA regulation at 20 C.F.R. § 629.37(a).[7] This regulation requires that all costs be "necessary and reasonable for the proper and efficient administration of the [JTPA] program. . . ." Again, the ALJ relies solely upon the U.S. Department of Labor's examination of only the Manasota contract, but he neglects the information that was also readily available in JTPA Revenue Account G-3880. A.F. at 68-75. The Detail Summary of the account lists each subgrant by Program Year and JTPA title, and indicates that 160, or 65%, of the contracts produced a high enough level of profits to make up the total losses incurred by the remaining 35% of the contracts and still show an excess net profit of almost $1 million. *Id.* at 62.

This information in the Detail Summary of Account G-3880 should have been available to the DLES JTPA administrators after each Program Year, and a cursory analysis would have revealed that the grants entered into by the DLET and the SDA agencies with

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[7] This regulation is at 20 C.F.R. § 627.435 (1993).

the ESJS local offices were excessive in their funding support of the ESJS local offices' JTPA program. The level of profit and the consistent pattern of contracts belies a finding that the State's JTPA administrators were prudently managing the program, incurring only those costs which were necessary. This failure to reduce contracting funding is all the more compelling when one reorganizes that DLET was, for all practical purposes, on both sides of the contracting process given their monitoring responsibilities over the contracting entities. I therefore find grounds for reversing the ALJ's finding on this issue as well.

The ALJ likewise faults the Grant Officer's determination that the State violated the provisions of Office and Management and Budget (OMB) Circular A-87, which the State adopted in October, 1983, for its administration of the JTPA program. D. and O. at 7. The ALJ focuses on a phrase that appears in the Circular that states: "[n]o provision for profit or other increment above cost is intended." The ALJ concluded that since the Circular "merely states that profits are not 'intended' under the JTPA. Stating that the earning of profits is not 'intended' cannot be interpreted to mean that profits are prohibited under the JTPA." *Id.*

However, it is necessary to read the phrase within the context of the entire section which pertains to the principles governing allowable costs applicable to grants between State entities and the Federal government. The *Purpose and Scope* section set forth in Attachment A provides:

> 1. *Objectives.* This attachment sets forth principles for determining the *allowable* costs

> incurred by State . . . governments under grants . . . with the Federal government . . . . The principles are for the purposes of cost determination. . . . They are designed to provide that federally-assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or increment above cost is intended. Emphasis provided.

A.F. at 85.

The last sentence modifies the previous sentence, which requires federal funds to pay the federal share of program costs, and that there be no allowance for more than the federal share. The word "intended" is not precatory, but is a form of the noun "intention," denoting a will, design or resolve to do or refrain from doing an act. Therefore, OMB Circular A-87 is applicable to the State's administration of its JTPA contracts and earned profits are not allowable costs.

The ALJ recognizes that the central issue in this case is that the case record contains a factual basis to determine that the State of Florida, through the several divisions of DLES, operated "a vertical monopoly over the federal JTPA funds with respect to the contracts in question, thereby creating an obvious conflict of interest." D. and O. at 8. The DLES was, with respect to the contracts with the ESJS, "the federal JTPA fund recipient, the state JTPA administrator, as well as a JTPA service provider." *Id.*

The ALJ held, however, that because the Grant Officer's Final Determination relied on the State's failure to use arm's length negotiation as a determinant that the costs charged to the JTPA were not

reasonable, and that the phrase "arms-length bargaining" as an important consideration in determining grant cost "reasonableness", first appeared in a Federal Register Notice revising OMB Circular A-87 was published subsequent to the audit, that therefore this fundamental aspect of sound business practice was inoperative in the determination of reasonable costs. I disagree. The lack of publication of a specific phrase doesn't negate the principle. The enmeshed relationships between the parties to the ESJS contracts signals a potential conflict of interest. Although the State produced its contracting procedures for the record (CX 36), this production does not rebut a presumption of a potential conflict of interest with the concomitant less than arm's length contract negotiations, given the pattern of significant profits earned by a unit of a State agency contracting with another unit the same State agency. I therefore find that there was a contravention of "sound management practices" and that such excess profits were not "necessary and reasonable for proper and efficient administration of the grant program", as required by the State's adoption of the earlier issuance of A-87.

I believe it appropriate to comment on the ALJ's discussion regarding the use of fixed unit price, performance based contracts in the JTPA program. There is no question that such contracting mode was permissible during the Program Years in question, nor is there any question that an entrepreneurial service provider would be allowed to make a profit if it was able to satisfy the terms of the contract for less cost than the negotiated amount. This mode of contracting requires, however, that the negotiations be conducted at arm's length. Where, however, the contracting parties are organizationally linked, there

has to be of necessity, a punctilious showing that the contracts were rigorously negotiated at arm's length.

The facts in this case are that intra-agency units used fixed cost contracts and the provider entities consistently, if not always, showed a significant profit of charges over costs. The factual burden of persuasion would have to be overwhelmingly convincing that the contracts had been let only after the most stringent negotiations and that the regulatory requirements governing single unit charge contracts were strictly adhered to. That is not the situation in this case. Substantially more than half of the contracts showed net profits that covered the losses of the other contracts, and the State netted almost $1 million. These results belie any claim of rigorous negotiation, written guidelines, notwithstanding.

In addition, the requirements allowing the use of single unit charge contracts found at 20 C.F.R. § 629.38(e)(2) which governed such contracts were not scrupulously followed. The contracts in the record failed to identify specific occupations trained for and their specified wage rates. Instead the contracts provided for gross numbers of participants to be served in a variety of ways to place them eventually into unsubsidized employment. While these are permissible contract goals, they are not within the regulatory requirements utilizing a single unit charge method of contracting.

The DLES used an allowable form of contracting but in an inappropriate situation. The ALJ's decision of May 2, 1994, is REVERSED.

Therefore, I find that the Grant Officer properly disallowed the $961,003 of excess profits accumulated by the State pursuant to the contracts between the DLES and the SDA's with the ESJS local offices.

The State of Florida Department of Labor and Employment Security IS ORDERED to pay such amount to the U.S. Department of Labor in non-Federal funds.

SO ORDERED.

/s/ ROBERT B. REICH
Secretary of Labor

Washington, D.C.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR

WASHINGTON, D.C.

Date: January 20, 1995
Case No. 92-JTP-17

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IN THE MATTER OF

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, COMPLAINANT

*v.*

UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

BEFORE: THE SECRETARY OF LABOR

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**ORDER DENYING REQUEST FOR RECONSIDERATION**

Counsel for the State of Florida, Department of Labor and Employment Security (State) has requested that I review and reconsider my decision issued December 5, 1994. In that decision I reversed the Administrative Law Judge's (ALJ) Decision and Order (D. and O.) of May 2, 1994, and affirmed the Grant Officer's disallowance of $961,003 resulting from the excess profits accumulated by the State charged to its Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1791 (1988), grants.

I note that generally, reconsideration is disfavored, *INS v. Doherty*, 112 S. Ct. 719. 724 (1992), and should be granted only to "correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). The JTPA language at Section 168(a)(3), 29 U.S.C. § 1578(a)(3), however, could be interpreted as requiring a party seeking judicial review of a Secretary's final order to specifically and timely urge all objections before the Secretary, prior to filing an appeal. Therefore, I have reviewed the State's request for reconsideration in light of the case record.

The State's request for reconsideration is denied.

**DISCUSSION**

A. The Burden of Production.

The ALJ determined that the Grant Officer failed to meet the burden of production pursuant to 20 C.F.R. § 629.57(i) (1988), because he relied on the wording of a single contract to conclude that 250 other contracts executed during a given time period between similar parties likewise violated the regulations governing fixed unit cost contracts.[1] D. and O. at 6. However, four other fixed unit cost contracts were introduced into evidence during the hearing by the State's counsel and averred to as representative of the 250 contracts at issue in this case. Transcript (Tr.) at 22-23. The ALJ, prior to issuing his decision, determined that the proffered contracts were "satisfactory to decide the issues involved in this audit."

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[1] *See also* 20 C.F.R. § 627.802(e) (1993).

ALJ's Corrected Order Denying Motion to Admit, issued Dec. 2, 1993, at 2.[2]

The regulations governing an ALJ's decision require that "[t]he decision of the ALJ shall be based upon the whole record. It shall be supported by reliable and probative evidence." 29 C.F.R. § 18.57(b) (1993). I found that the documentary evidence in the record, consisting in part of the Administrative File and the representative contracts, satisfied the Grant Officer's burden of production. *See State of Maine v. U.S. Dep't of Labor*, 669 F. 2d 827 (1st Cir. 1982). "A party will have satisfied his burden of production if the *evidence presented* is sufficient to enable a reasonable person to draw from it the inference sought to be established (emphasis supplied)." *Id.* at 830.

B. The Burden of Persuasion.

The State had the burden of persuasion to prove that the balance of the contracts it had in its possession,[3] in some 40 or 50 boxes, Tr. at 21-22, in fact complied with the regulations. The State did not introduce into evidence those other contracts, nor any summary or sample thereof. It is a fair inference, therefore, to conclude that the balance of the extant contracts were, as stated by the State's counsel, essentially no different from the contracts introduced into evidence.

On reviewing the contracts in the record, it is evident that they provide generally for placement

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[2] In that Order, the ALJ denied the Respondent's request to read as adverse to the Complainant all of the contracts which were not produced during discovery as required.

[3] The State apparently destroyed the contracts from Program Years 1983-1985. *See* ALJ's Corrected Order Denying Motion to Admit at 2.

activities, including placement without training, and not for training in specific occupations at agreed upon wage rates. Thus, they do not satisfy the regulatory requirements for fixed cost contracts. The regulation at 20 C.F.R. § 629.38(e)(2) (1991)[4] which governs the acceptability of single unit charge (fixed unit cost) contracts as exceptions to the statutory limitation on administrative expenditures,[5] must be strictly construed. *Texas Dep't of Commerce and Fort Worth Consortium v. U.S. Dep't of Labor*, Sec. Dec. and Order, Nov. 1, 1993, slip op. at 2-10, *appeal docketed*, No. 93-5543 (5th Cir. Nov. 30, 1993).

The State's failure to prove compliance with the regulation thereby tends to support rather than rebut the evidence indicating a violation of the regulations. *State of Maine*, 669 F. 2d at 831.

C. The Allowability of Profits.

The Grant Officer's response to the State's Motion for Reconsideration suggests that the section of the Final Decision regarding the nonallowability of profits may not be consistent with the Department's interpretation at the time of the underlying audit. Counsel for the Grant Officer refers to a Notice published in the Federal Register eliciting comments from the public regarding, among other things, the question of profits realized through the use of fixed unit cost contracts.[6] Although the Notice may be indicative of the Employment and Training Administration's prior uncertainty of how to address problems in the use of fixed unit cost contracts, it does not

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[4] This section does not appear in the current regulations.

[5] 29 U.S.C. § 1518 (1988).

[6] 53 Fed. Reg. 7989, 7992 (1988).

overcome the plain meaning of the language of the Objectives section of the governing cost principles adopted by the State for its administration of JTPA.

**CONCLUSION**

A review of the case record in light of the specific objections raised by the State fails to provide any reason for modification or reversal of my December 5, 1994 decision.

The State of Florida, Department of Labor and Employment Security's request for reconsideration IS DENIED.

SO ORDERED.

/s/ ROBERT B. REICH
Secretary of Labor

Washington, D.C.